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IN THE

Supreme Court of the United States

OCTOBER TERM 1990

STEVEN P. GERBER,
Cross-Petitioner,

v.

V-1 OIL COMPANY,
Cross-Respondent.

CROSS-PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE TENTH CIRCUIT

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QUESTIONS PRESENTED FOR REVIEW

1. Is WYO. STAT. §35-11-109(a)(vi) (Cum. Supp. 1990), which permits warrantless administrative searches by environmental inspectors, constitutional under the fourth amendment?

2. Was V-1 Oil Company's expectation of privacy adequate to support an action pursuant to 42 U.S.C. §1983?

3. Is Steven P. Gerber entitled to good faith qualified immunity from suit under 42 U.S C. §1983, on the ground that he did not violate a clearly established right of V-1 Oil Company?

LIST OF PARTIES

Steven P. Gerber brings this matter before the United States Supreme Court on a cross-petition for writ of certiorari.

V-1 Oil Company, a Wyoming corporation, is named in this matter as the Cross-respondent.

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CROSS-PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE TENTH CIRCUIT

Cross-petitioner, Steven P. Gerber, requests that a writ of certiorari be issued to review the judgment and opinion of the United States Court of Appeals for the Tenth Circuit entered on April 30, 1990.

OPINIONS BELOW

On September 28, 1988, the U.S. District Court for the District of Wyoming issued its decision in this matter, which has been recorded at 696 F.Supp. 578 (D. Wyo. 1988). V-1 Oil Company appealed the decision of the District Court to the Tenth Circuit Court of Appeals. The opinion of the Court of Appeals is reported at 902 F.2d 1482 (10th Cir. 1990). A copy of the Tenth Circuit's opinion has been attached to V-1 Oil Company's Petition for Writ of Certiorari as Appendix A.

A copy of the opinion of the U.S. District Court is attached to V-1 Oil Company's Petition for Writ of Certiorari as Appendix B.

JURISDICTION

The judgment of the United States Court of Appeals for the Tenth Circuit was entered on April 30, 1990. Jurisdiction of this Court is invoked pursuant to 28 U.S.C. §1254(1). This suit was brought initially pursuant to 42 U.S.C. §1983.

The Cross-respondent, V-1 Oil Company, filed a petition for writ of certiorari in this matter on July 23, 1990. The Cross-petitioner received that petition on July 23, 1990. The Cross-petition is submitted pursuant to Rule 12.3 of the Rules of the Supreme Court of the United States.

CONSTITUTIONAL PROVISIONS AND STATUTES INVOLVED

The following constitutional provisions and statutes are involved:

United States Constitution
Amendment IV

The right of the people to be secure in their persons, houses, papers and effects, against unreasonable searches and seizures, shall not be violated, and no Warrants shall issue, but upon probable cause, supported by Oath or affirmation, and particularly describing the place to be searched, and the persons or things to be seized.

United States Constitution
Amendment XIV, Section 1

All persons born or naturalized in the United States and subject to the jurisdiction thereof, are citizens of the United States and of the State wherein they reside. No State shall make or enforce any law which shall abridge the privileges or immunities of citizens of the United States; nor shall any

State deprive any person of life, liberty, or property, without due process of law; nor deny to any person within its jurisdiction the equal protection of the laws.

TITLE 42 U.S.C. §1983

Every person who, under color of any statute, ordinance, regulation, custom, or usage, of any State or Territory or the District of Columbia, subjects, or causes to be subjected, any citizen of the United States or other person within the jurisdiction thereof to the deprivation of any rights, privileges, or immunities secured by the Constitution and laws, shall be liable to the party injured in an action at law, suit in equity, or other proper proceeding for redress. For the purposes of this section, any Act of Congress applicable exclusively to the District of Columbia shall be considered to be a statute of the District of Columbia.

WYO. STAT. §35-11-109 (Cum. Supp. 1990)

Powers and duties of director.

(a) In addition to any other powers and duties imposed by law, the director of the department shall:

(vi) Designate authorized officers, employees or representatives of the department to enter and inspect any property, premise or place, except private residences, on or at which an air, water or land pollution source is located or is being constructed or installed, or any premises in which any records required to be maintained by a surface coal mining permittee are located. Persons so designated may inspect and copy any records during normal business office hours, and inspect any monitoring equipment or method of operation required to be maintained pursuant to this act at any reasonable time (upon reasonable notice) upon presentation of appropriate credentials, and without delay, for the purpose of investigating actual or potential sources

> of air, water or land pollution and for determining compliance or noncompliance with this act, and any rules, regulations, standards, permits or orders promulgated hereunder. For surface coal mining operations, right of entry to or inspection of any operation, premises, records or equipment shall not require advance notice. The owner, occupant or operator shall receive a duplicate copy of all reports made as a result of such inspections within thirty (30) days. The Department shall reimburse any operator for the reasonable costs incurred in producing copies of the records requested by the department under this section.

STATEMENT OF THE CASE

Steven P. Gerber is the Northwest District Supervisor for the Wyoming Department of Environmental Quality, Water Quality Division. Part of Mr. Gerber's duties include investigating discharges of pollution, including petroleum products, into surface water or groundwater within the State.

The actions taken by Cross-petitioner Gerber in this matter occurred on April 28, 1988, in Lander, Wyoming at a retail gasoline station owned by Cross-respondent V-1 Oil Company (hereinafter "the V-1 station").

The V-1 station is a self service gasoline station that sells gasoline to retail customers and is open to the public during normal business hours from 7:00 a.m. until 9:00 p.m. daily. In addition to selling gasoline, the V-1 station also sells liquid propane and certain grocery products and operates a video movie rental business.

When Steve Drake, an employee of V-1 Oil, came on duty at the station at 3:00 p.m. on April 28, 1988. Rick Evans, the station manager, told him to notify him if anyone wanted to "look at dirt or whatever" and that "DEQ might come by and look at it."

At approximately 8:20 p.m., Cross-petitioner Gerber, acting upon the advice of an assistant attorney general for the State of Wyoming, walked onto the V-1 station premises and notified the attendant that he was there to conduct an inspection of the premises pursuant to state statute. Mr. Gerber had been aware that the V-1 station was a source of gasoline pollution because samples of groundwater taken from wells located hydrologically downgradient from the V-1 station had revealed that the groundwater was polluted by gasoline.

Mr. Gerber inspected the area where underground storage tanks containing gasoline were located. He observed that the underground storage tanks, although they had been uncovered, were being prepared for testing, and not removal. Mr. Gerber also noticed very strong hydrocarbon odors in the excavation area. He collected a sample of soil near one of the underground storage tanks. Shortly thereafter, Mr. Gerber left the area. The entire incident lasted approximately ten minutes.

REASONS THE CROSS-PETITION SHOULD BE GRANTED

Summary

This matter should be heard by the Court for three reasons. It presents an important question of the constitutionality of warrantless administrative search statutes relating to environmental violations. It presents an excellent opportunity for the Court to define the limits of a reasonable expectation of privacy, in the context of a retail business setting, for actions brought pursuant to 42 U.S.C. §1983. Finally, a conflict in circuit court opinions exists on the issue of good faith qualified immunity from suit in civil rights action.

I.

THE CONSTITUTIONALITY OF WARRANTLESS ENVIRONMENTAL INSPECTION STATUTES IS AN ISSUE OF NATIONAL IMPORTANCE.

Introduction

In the last twenty-five years, Congress has passed an array of environmental statutes which give inspectors "a right of entry" to various facilities.[1]

All of these inspection statutes authorize the federal government to enter and inspect designated property without obtaining a search warrant. These statutes are not limited to particular types of businesses.

The State of Wyoming's environmental inspection statute covers all businesses at which a pollution source may be

1. See Clean Water Act of 1977 §308, 33 U.S.C. §1318(a)(B) (1986). (Giving the administrator a right of entry to, upon or through a facility in which an effluent source is located or in which any records required to be maintained under the Act or located in and to have access or copy such records, inspect monitoring, equipment and sample effluents); Comprehensive Environment Response. Compensation and Liability Act of 1980 (CERCLA) §104(e), 42 U.S.C. §9604(e) (West Supp. 1985) (giving any officer, employee, or representative of the President, duly designated by the President, the right to enter at reasonable times, any vessel, facility, establishment or other place or property where any hazardous substance may be or has been generated, stored, treated, disposed of or transported from, from which or to which a hazardous substance has been or may have bene released, where such a release is or may be threatened or where entry is needed to determine the need for or the appropriate response or to effectuate a response action) (amended by SARA 1986); Resource Conservation and Recovery Act of 1976 (RCRA) §3007, 42 U.S.C. §6927(a)(1982) (giving the Administrator a right of entry to, upon or through in which an effluent sources is located and to have access to or copy such records, inspect monitoring equipment and sample emissions); Hazardous Liquid Pipeline Safety Act of 1979 §211(c), 49 U.S.C. §2010(c) (West Supp. 1988); Hazardous Materials Transportation Act of 1974 §109(c), 49 U.S.C. §1808(c) (1982); Federal Insecticide. Fungicide and Rodenticide Act (FIFRA) §9, 7 U.S.C. §136g(a)(1980); Toxic Substances Control Act (TSCA) §11, 15 U.S.C. §2610 (1982).

located. Except for this somewhat broader "pollution source" language, Wyoming's inspection statute is very similar to the federal inspection statutes contained in several federal environmental protection acts.

Both federal and state governments have recognized the need to conduct environmental inspections without search warrants. If the Tenth Circuit opinion is allowed to stand, the constitutionality of those statutes would be challenged. This, under at least some circumstances, would be a disaster for environmental enforcement in the United States.

A Balancing Test Reveals that Searches of this Type are Reasonable.

The expectation of privacy of a commercial business owner must be balanced against the considerable public need to use warrantless inspection statutes of general applicability.

In *Michigan Department of State Police v. Sitz*, __ U.S. __, 110 S.Ct. 2481, 110 LEd2d 412 (1990), the Court utilized a balancing testing in which a substantial state interest was weighed against a defendant's expecation of privacy. The Court also observed that in order for a search to be valid it must be "reasonable" under the fourth amendment. 110 S.Ct. at 2485.

Based on its holding in *Sitz*, the Court should now examine Wyoming's administrative inspection statute to determine whether environmental inspections are reasonable. There is a substantial governmental interest in protecting the environment and the public from harmful pollution. This interest, if balanced against the slight intrusion on the privacy expectations of V-1 Oil Company, must weigh more heavily. Under such a balancing test, the search conducted by Cross-petitioner Gerber is reasonable and within the bounds of the fourth amendment.

Probable cause to conduct the search was established by the State's evidence that gasoline was present in the groundwater immediately downgradient from the V-1 Oil station. The warrantless search was also reasonable because of the

need to collect information without delay. The State had made an effort to obtain a court order. But only after it was obvious that a court order could not be obtained while the tanks were still exposed did the state abandon its efforts to get a warrant. The need for this warrantless administrative inspection was great and the governmental interest was substantial. Further, the statute under which Mr. Gerber operated limited the inspection as to time, place and scope.

Balanced against this need for a warrantless inspection, is V-1 Oil Company's arguable expectation of privacy. However, any expectation of privacy that V-1 Oil Company had was, at best, insignificant. The V-1 station sold gasoline to the public and the public was free to enter on its property for that purpose, as well as to buy grocery items, or rent movies. The underground storage tanks which were inspected by Cross-petitioner Gerber were in open view. There was no enclosure around the area.

Under the balancing test of *Michigan Department of State Police v. Sitz, supra,* Mr. Gerber's search was reasonable.

The Wyoming Warrantless Environmental Inspection Statute Meets the Requirements of New York v. Burger.

In *New York v. Burger,* 482 U.S. 691 (1987), this Court held that a New York statute which authorized the warrantless inspection of automobile junkyards satisfied the fourth amendment. The Court specifically held that in order for a warrantless inspection statute to be valid the statute must support a substantial governmental interest; the statute must be necessary to further a regulatory scheme; and the statute must be limited in time, place and scope so that the inspector has little discretion.

It is undisputed that Cross-petitioner Gerber complied with the Wyoming statute when he made his warrantless inspection. The inspection occurred while the gasoline station was open during regular business hours. Mr. Gerber presented his credentials and "inspected without delay." Mr. Gerber's

inspection was limited to investigating "sources of pollution." All that Mr. Gerber did was observe the station's underground storage tanks and take a small sample of soil near the tanks.

The environmental inspection of a closely regulated industry, such as the retail distribution of gasoline, under a statute which authorizes the investigation of any "actual or potential sources of pollution" should be upheld by this Court. There was a substantial governmental interest in the protection of the environment and the public from pollution. The warrantless inspection was necessary to further the State's regulatory environmental scheme. The Wyoming statute embodies the two basic aspects of a warrant: it requires that the owner of the commercial premises be advised that the search was being made pursuant to law and it limits the scope of the search to environmental concerns. The statute further limits the discretion of the inspecting officer by requiring that the inspection be made "during normal office hours" or at a "reasonable time." *New York v. Burger,* 482 U.S. at 711. Furthermore, the scope of the statute is properly defined. An inspection is only permitted so that actual or potential sources of pollution may be identified.

The effect of the Tenth Circuit's opinion will be to require both Congress and state legislatures to develop statutes which recite a laundry list of inspection authority for various closely regulated businesses. This is unnecessary when the essential requirements of *New York v. Burger, supra,* have been met and when the need for warrantless environmental inspections is clearly in the public interest.

II.

THE EXTENT OF A RETAIL BUSINESS' EXPECTATION OF PRIVACY IS AN IMPORTANT NATIONAL ISSUE ON WHICH GUIDANCE FROM THE COURT IS NEEDED.

The fourth amendment to the United States Constitution protects "people" and secures them against unreasonable

searches of their "persons, houses, papers and effects." Whether an unreasonable search has occurred will depend in part upon whether the person had an expectation of privacy in the thing or area to be searched.

While an expectation of privacy has been held to extend to commercial premises, that expectation is less than an individual has in his own home. *Donovan v. Dewey,* 452 U.S. 594, 598-99 (1981). This expectation of privacy for businesses in "closely regulated" industries is particularly attenuated. *New York v. Burger,* 482 U.S. at 700.

In *Katz v. United States,* 389 U.S. 347, 361 (1967), in a concurrence, Justice Harlan set out a two-prong test for determining whether an expectation of privacy had been violated. First, there must be an actual or subjective expectation of privacy in the area inspected. Second, that expectation must be one that society would deem reasonable. 389 U.S. at 361. See also, *Smith v. Maryland,* 442 U.S. 735, 740 (1979) and *Rakas v. Illinois,* 439 U.S. 128, 139-40 (1978)

At some point, under the *Katz* doctrine, the outer limits of a corporation's expectations of privacy is reached. This case presents an excellent opportunity for this Court to define precisely the nature of those outer limits.

As this Court concluded in *Air Pollution Variance Board v. Western Alfalfa Corp.,* 416 U.S. 861 (1974), privately owned lands constitute "open fields" so long as the public is able to enter them. 416 U.S. at 865. The principle that no expectation of privacy exists in an open field was first articulated in *Hester v. United States,* 265 U.S. 57 (1924). In *Dow Chemical Company v. United States,* 476 U.S. 227 (1986), the Court declined to find any "industrial curtilage" in which a corporation could claim that it had a legitimate expectation of privacy. Without a reasonable expectation of privacy, there can be no violation of fourth amendment rights, and therefore, no need to obtain a search warrant.

As was made clear in *Air Pollution Variance Board v. Western Alfalfa Corp., supra,* entry onto private land on which

the public is able to enter does not constitute an unreasonable search. Similarly, Cross-petitioner Gerber's entry onto the retail gasoline station owned by V-1 Oil Company should not be considered to have constituted an unreasonable search, because he did not intrude upon any legitimate expectation of privacy.

It is true that Mr. Gerber also took a sample of soil from near the underground storage tanks. Because Mr. Gerber noted strong hydrocarbon odor in the area of the underground storage tanks, his removal of a soil sample as evidence was justified under the plain view doctrine. *Payton v. New York,* 445 U.S. 573, 586-87 (1980) and *G.M. Leasing Corp. v. United States,* 429 U.S. 338, 354 (1977). He was legitimately present on the V-1 station property, as any member of the public would be, and only after smelling the strong odor emanating from the tank area (the equivalent of a "plain view") did the need to preserve the soil sample as evidence arise. Probable cause was present and the evidence was seized from an essentially open field. See *Oliver v. United States,* 466 U.S. 170 (1984).

The use, or misuse, of 42 U.S.C. §1983, by corporations as a vehicle for filing lawsuits against governmental officials will be greatly expanded if the Tenth Circuit Court of Appeals decision is allowed to stand. However, a ruling from this Court on the limits of a corporation's reasonable expectations of privacy in retail business establishments would decrease the number of such lawsuits to situations where a corporation's privacy has actually been invaded.

III.

THERE IS A CONFLICT BETWEEN CIRCUIT COURTS OF APPEAL ON THE SUBJECT OF GOOD FAITH QUALIFIED IMMUNITY.

In *Freeman v. Blair,* 793 F.2d 166 (8th Cir. 1986), the Circuit Court of Appeals for the Eighth Circuit held that South Dakota officials who had inspected a campground pursuant

to a warrantless administrative search statute were not entitled to a good faith qualified immunity from suit for actions brought under 42 U.S.C. §1983. The *ratio decidendi* was that the statute did not provide sufficiently detailed guidelines to insure that the warrantless inspection of campgrounds would be conducted with the requisite "certainty and regularity." 793 F.2d at 175. S.DAK. STAT. §34-18-24 directed the Secretary of Health to "periodically inspect . . . every . . . campground operating within this state for compliance with the provisions of this chapter and the rules and regulations of the Department of Health." Any search was to be done at any "reasonable time." See *Freeman v. Blair,* 793 F.2d at 175.

The case was appealed and the United States Supreme Court, in *Blair v. Freeman,* 483 U.S. 1014 (1987), reversed and remanded with instructions to the Eighth Circuit to decide the case in light of this Court's decisions in *Anderson v. Creighton,* 483 U.S. 635 (1987) and *New York v. Burger, supra.*

On remand, the Eighth Circuit Court concluded that at the very least, the regulatory scheme established by the South Dakota statute was "not sufficiently obvious to make the defendant's reliance on the scheme objectively unreasonable." *Freeman v. Blair,* 862 F.2d 1330, 1331 (8th Cir., 1988). The defendants in that case were, therefore, entitled to a good faith qualified immunity from suit.

At the time of the inspection conducted by Cross-petitioner Gerber, *Blair v. Freeman* was on remand. At that point in time, a reasonable interpretation of the status of warrantless inspection statutes would have been that any statute which was at least minimally circumscribed would generally be viewed as constitutional. Yet, the Tenth Circuit Court of Appeals in *V-1 Oil v. State of Wyoming, et al.,* 902 F.2d 1482 (10th Cir. 1990) ruled that the law in this area is clearly established and that Cross-petitioner Gerber would not have been entitled to a good faith qualified immunity from suit, but for extraordinary circumstances.

There is a clear contradiction between the Eight and Tenth Circuit Courts of Appeal on this issue. The Supreme Court should settle this conflict.

CONCLUSION

For the foregoing reasons, the petition for writ of certiorari should be granted.

Respectfully submitted,

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